2012 New Laws Update

New Court Decisions
2011-2012

New Legislation -
2012 General Assembly

Prepared by the Commonwealth's Attorneys' Services Council 2012

Criminal Procedure Issues

Supreme Court Decides GPS Case

- ***U. S. v. Jones*, 132 S. Ct. 945 (January 23, 2012).** "The trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs."
- **Implication (but not held) that warrant needed for GPS tracking device.**

General Assembly Response to Jones

- **Emergency legislation - effective since April 5, 2012.**
- **New § 19.2-56.2: GPS Warrant**

GPS - § 19.2-56.2

"Tracking device“: an electronic or mechanical device that permits a person to remotely determine or track the position or movement of a person or object.

"*Use* of a tracking device“: includes the installation, maintenance, and monitoring of a tracking device (but **not** interception of wire, electronic, or oral communications or the capture, viewing of images.

GPS - § 19.2-56.2

Procedure:

- LEO applies for search warrant.
- Application to **judicial officer** in circuit where device to be installed, or where probable cause re offense.
- Affidavit may be filed by
  - (i) facsimile or
  - (ii) electronic record (per § 59.1-480)

GPS - § 19.2-56.2

Affidavit must identify:

- Applicant / law-enforcement agency;
- What is being tracked;
- Owner or possessor of tracked item, if known;
- Jurisdictional area where item to be found (if known);
- Facts for probable cause for issuance of warrant; and
- Jurisdictional area (county or city) where there is probable cause to believe the offense commission.

GPS - § 19.2-56.2

Judicial officer **shall issue** search warrant authorizing use of tracking device upon finding probable cause that:

(1) crime was, is, or will be committed and

(2) information likely to be obtained from device will be evidence of the offense

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GPS - § 19.2-56.2

- Search warrant **authorizes use of device from within the Commonwealth** to track a person or property for a reasonable period of time, **not to exceed 30 days** from the issuance of the search warrant.

- The **circuit court** may, for good cause shown, grant one or more extensions, not to exceed 30 days each.

GPS - § 19.2-56.2

After warrant issues:

- **Install** device within 15 days;
- **Record** exact date / time device installed **and** period during which it was used;
- **Monitor** the device during the period authorized
- **Remove** device “as soon as practical” - but not later than 10 days after end of use (Upon request/good cause shown, circuit court may grant 10 day extensions).
- **Disable** device, if cannot remove, and **stop using** device.

GPS - § 19.2-56.2

- **Within 10 days after the use of the tracking device has ended** LEO returns executed warrant – to circuit court clerk.

- **Within 10 days after the use of the tracking device has ended,** a copy of executed search warrant shall be served person tracked / property owner, **unless**

- Upon request, for good cause shown, the **circuit court** may grant one or more extensions for such service for a period not to exceed 30 days each. **Good cause shall include, but not be limited to, a continuing criminal investigation, the potential for intimidation, the endangerment of an individual, or the preservation of evidence**.

GPS - § 19.2-56.2

- Judicial officer issuing warrant will **certify** affidavit, **deliver** it to circuit court clerk where there is probable cause of the offense, and clerk shall preserve as record.

- **By operation of law, the affidavit, search warrant, return, and any other related materials or pleadings shall be sealed.**

- Upon motion of the Commonwealth or the owner or possessor of the vehicle, container, item, or object that was tracked, the **circuit court may unseal** such documents if it appears that the unsealing is consistent with the ends of justice or is necessary to reasonably inform such person of the nature of the evidence to be presented against him or to adequately prepare for his defense.

GPS - § 19.2-56.2

- Unauthorized disclosure of the existence of a search warrant issued pursuant to this section, application for such search warrant, any affidavit filed in support of such warrant, or any return or data obtained as a result of such search warrant that is sealed by operation of law is punishable as a Class 1 misdemeanor.

HB 17 (Kilgore) **- Electronic filing of search warrant affidavits.**
Amends § 19.2-54

- Adds use of electronic records/electronic transactions per 2000 law § 59.1-479:
- The affidavit may be filed by electronically transmitted *(i)* facsimile process *or (ii) electronic record as defined in § 59.1-480*. … delivered by *use of filing and security procedures as defined in the Uniform Electronic Transactions Act (§ 59.1-479 et seq.) for transmitting signed documents….*

HB 1154 (Poindexter) – **VSP access to insurance e-evidence.**

- Amends § 52-38 expands VSP Insurance Fraud Unit access to evidence to include information maintained in an electronic format and which may be accessed by insurance professionals within the Commonwealth.
- § 52-38 *(B)* adds the authentication/business record language from§ 19.2-70.3 to make the materials admissible as business records.

HB 941 (Lingamfelter) / SB 133 (Stanley) – **Fire invest. warrant.** Amends § 52-38

- Authorizes "*investigator appointed pursuant to § 27-56*" - State Police arson investigators - to obtain administrative warrants to investigate fires. Current law only authorizes fire marshals to obtain such warrants.

Stops

- *U.S. v. Glover*, 662 F.3d 694 (4th Cir. 2011). "High crime" nature of area is a relevant factor but not dispositive for *Terry* stop
- "The Fourth Amendment does not preclude officers from taking modest steps to protect twenty-four hour gas stations, convenience stores, or fast-food outlets from armed robberies."

Stops

- *Shifflett v. Commonwealth*, 58 Va. App. 732, 716 S.E.2d 132 (2011).
- "The 'mere possibility of an innocent explanation' does not necessarily exclude a reasonable suspicion that the suspect might be violating the law." The facts here created a reasonable suspicion that defendant might not have been using his unregistered pickup truck consistent with the statutory exemptions governing farm use vehicles.

Stops

- *U. S. v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir. 2011)
- Possessing probable cause that a driver has committed a traffic infraction does not give an officer free rein to keep the vehicle and its passengers on the side of the road while the officer investigates any hunch.
- Although an officer may investigate matters unrelated to the justification for a traffic stop, those investigatory pursuits must be limited in both scope and duration, and are evaluated under the totality of the circumstances.

HB 187 (Gilbert) – No motorcycle checkpoints.

- Amends § 46.2-103 concerning officers' authority to stop vehicle to inspect its equipment, operation, etc.

  "Nothing in this section, however, shall be construed to authorize the establishment on any highway of police check-points where the only vehicles subject to inspection are motorcycles."

Stops

- *Branham v. Commonwealth*, 283 Va. 273; 720 S.E.2d 74 (2012)
- "Code §46.2-104, requiring the owner or operator of a motor vehicle to exhibit his driver's license to an officer for identification, applies only when such a driver has received a signal to stop from a law-enforcement officer.
- Here, request to see already parked D's driver's license was no more than a request, and defendant's compliance was voluntary and not coerced.

Stops

- *U.S. v. Powell*, 666 F.3d 180 (4th Cir. 2011).

  Pat down unconstitutional when based solely on "caution data" – radio report that the passenger in the car had "priors" for armed robbery.

Stops

- *U.S. v. Massenburg*, 654 F.3d 480 (4th Cir. 2011). "Fellow officer" doctrine: "when an officer acts on an instruction from another officer, the act is justified if the instructing officer had sufficient information to justify taking such action herself; in this very limited sense, the instructing officer's knowledge is imputed to the acting officer."
- Only applies in context of **communicated** alerts or instructions.
- Does not authorize courts to add up bits and pieces of information held by assorted officers and automatically attribute all information to actions of one.

Good faith reliance on dispatcher report for arrest

Bellamy v. Commonwealth, 724 SE2d 232 (5/1/2012) (CAV No. 0199111)

Trial court did not err in denying appellant's motion to suppress evidence found during a search incident to arrest where officer's objectively reasonable good faith reliance on initial dispatcher's report of an outstanding warrant for appellant's arrest did not require suppression of bullet in appellant's pocket.

Reasonableness of detention / search

- *US v. McBride*, 676 F3d 385, No. 10-5162 (4th Cir., April 23, 2012).

- Convictions for PWID cocaine, etc, affirmed in part, where (a) police officers' detention of the defendant's car was supported by reasonable, articulable suspicion, and (b) the 55-minute period between the beginning of the detention and the arrival of the canine narcotics unit did not result in an unlawful seizure of the car.

Search Incident to Arrest

- *U.S. v. Edwards*, 666 F.3d 877 (4th Cir. 2011). "All searches, including searches incident to an arrest, must be reasonable…."
- Reasonableness is determined by the totality of the circumstances, which include the location of the search [public or private], the intrusiveness of the search, and the safety, health, and fear of the defendant.
- Here "drugs were removed from Edwards' person in an unnecessarily dangerous, and thus unreasonable, manner" when, on a dark public street "without the aid of the flashlight, [police] took the knife and cut the sandwich baggie off Edwards' penis."

Custodial interrogation

- *Howes v. Fields*, 132 SCT 1181, No. 10-680 (2/21/2012)
- Supreme Court reverses 6th Circuit's grant of habeas relief, holding : questioning of a prisoner is not always custodial when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison. The Supreme Court held that the "record in this case reveals that respondent was not taken into custody for purposes of Miranda".

Exclusionary Rule

- *Davis v. U.S.*, 131 S. Ct. 2419 (2011). "When the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." At the time the search was conducted, it was lawful under *New York v. Belton*. But while the case was on appeal, *Arizona v. Gant* overturned *Belton*.
- *Foltz v. Commonwealth*, 58 Va. App. 107, 706 S.E.2d 914 (2011). "The exclusionary rule does not bar the eyewitness testimony of the officers who witnessed appellant sexually assault the victim. The assault the officers observed was a new and distinct offense and sufficiently independent of any information obtained by them from the GPS tracking device" placed on the vehicle used by appellant.

Searches

- *Kentucky v. King*, 131 S. Ct. 1849 (2011). "The exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable…."
- Police following suspected drug dealer smelled marijuana outside apartment door. Police knocked on the door, heard noises consistent with the destruction of evidence, kicked down door, entered, and found drugs in plain view.
- HELD: police, like any citizen, may knock at a door; conduct was not unlawful. "Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." [The Court withheld judgment on a situation where police threaten entry without any legally sound basis for a warrantless entry].

Searches

- *U.S. v. Ortiz*, 669 F.3d 439 (4th Cir. 2012). Probable cause requires a "reasonable belief" which "is less demanding than a standard requiring a preponderance of the evidence for the belief."
- "[O]nce voluntary consent is given, it remains valid until it is withdrawn *by the defendant*."

Reasonableness of search

- *US v. Laudermilt*, 677 F3d 605, No. 11-4624 (4th Cir., 5/3/2012).

- Reversing suppression of firearm; police officers' actions were consistent with the Fourth Amendment; in a threatening domestic situation, with information that (at least) a special needs child still was in house, they conducted a properly circumscribed protective sweep, which yielded the discovery of a firearm.

Invalid “patdown”

- *US v. Powell*, 666 F3d 180, No. 08–4696 (4th Cir., 11/14/2011)

- Convictions vacated. Police, during a routine traffic stop, lacked reasonable suspicion to remove defendant from his vehicle and perform an officer-safety pat down.
- District court erred in denying defendant's motion to suppress evidence derived from the patdown.

Invalid stop not a consensual encounter

- *US v. Jones*, ___ F3d ___, No. 11-4268 (4th Cir., 5/10/2012)

- Reversing district court's denial of a motion to suppress
- Absence of a reasonable, articulable suspicion of criminal activity when totality of circumstances showed 4th Am. seizure, not a consensual encounter
- police followed closely D's car containing 4 African-American men on public street, looking for (but not finding) vehicle reason to stop; followed to private property where car discharged passengers and police blocked car before approaching vehicle and questioning D.

Dissipation of "taint" from initial entry

- *Echavarry v. Commonwealth*, ___ SE2d ___, 2012 WL 1670792, No. 1010114 (5/15/2012)

- Motion to suppress heroin and marijuana found during search of appellant's belongings as he was admitted to jail pursuant to unrelated charges properly denied where connection between entry to house and discovery of controlled substances so attenuated as to dissipate any taint from the entry.

Ambiguous request for counsel

- *Stevens v. Commonwealth*, 283 Va. 296, 720 SE2d 80 (1/13/2012)
- Defendant's statement made to police during a custodial interrogation was properly admitted; in these particular circumstances, request for a lawyer was ambiguous and officers were entitled to ask further clarifying questions.
- D's statement "[t]hat's what I want, a lawyer, man" was ambiguous in circumstances because unclear whether he requested the presence of an attorney during custodial interrogation, or whether simply expressed his desire to have an attorney appointed to represent him at trial.

Miranda, voluntariness

- *Commonwealth v. Quarles,* 283 Va 214, 720 SE2d 84 (1/13/2012), *reversing*, 58 Va App 13, 707 SE2d 7 (2011).
- D declined to be interviewed and asked for his attorney; detective says: ["]that's fine. I'm not the person who robbed the white lady and hit her in the head with a brick["] and: ["]if that's the story he wants to tell the judge, then, that's fine["]. D then gives full confession.
- "[I]t cannot be said that the detective should have known that the defendant was likely to respond by insisting upon making a self-incriminating statement…"
- D's confession ruled voluntary and not in violation of Miranda, etc

Prison / jail searches

- *Florence v. Board of Chosen Freeholders of County of Burlington,* 132 SCT 1510, No. 10-945 (4/2/2012).

- Supreme Court rejects plaintiff's argument in federal civil rights lawsuit (42 USC § 1983) for a rule that persons arrested for minor offenses cannot be subjected to invasive searches unless prison officials have reason to suspect concealment of weapons, drugs, or other contraband.
- The search procedures at the county jails struck a reasonable balance between inmate privacy and the needs of the institutions, and were not unconstitutional.

Pre-Trial and Trial Issues

SB 158 (Obenshain) **- Bail; concurrence of CA.**
Amends § 19.2-120

- Different treatment for judges and magistrates/clerks.
- Magistrate, clerk, or deputy clerk may **not** bail Δ charged with an offense with *rebuttable presumption against bail* unless CA ***concurs*** or the bail previously was set by a judge.
- Judge may set or admit such Δ to bail *after* ***notice*** *and an opportunity to be heard* has been provided to CA.

HB 1244 (Johnson) **– Bail; adult charged with juvenile offenses .**
Amends § 16.1-247

- Authorizes magistrate to release on bail or recognizance an adult taken into custody pursuant to a warrant or detention order alleging a delinquent act committed *when the adult was a juvenile*.

HB 185 (Gilbert) - **Enforcement of state criminal offenses.** ***New*** *§ 19.2-340.1*

- May 2011 OAG opinion to the Honorable Neil S. Vener, confirmed that CA could amend VSP misdemeanor to equivalent local ordinance charge for offenses **not found** in Title 46.2 of the Code (eg., §18.2-266).

- ***New*** *§ 19.2-340.1*: when State Police (or other *state* officer) arrests / issues summons for a **Code** violation, the person arrested or summoned shall be charged with Code violation and **not a substantially similar local ordinance**.

HB 185 (Gilbert) - **Enforcement of state criminal offenses.**

- *When a law-enforcement officer of (i) the Department of State Police or (ii) any other division of the state government makes an arrest or issues a summons for a violation of a provision of the Code of Virginia, the person arrested or summoned shall be charged with a violation of that Code provision and shall not be charged with a substantially similar local ordinance. All fines collected upon conviction of any person so arrested or summoned shall be credited to the Literary Fund.*

HB 348 (Miller) / SB 325 (Carrico)

Asset Forfeiture clean-up bill.

- Single method asset forfeiture procedural process [Ch 22.1] : "ENFORCEMENT OF FORFEITURES"

- §19.2-386.1 *et seq.* method is default procedure for **all forfeitures** absent specific provisions in law to the contrary

- Cleans up inconsistencies in existing law.

- Repeals §4.1-340 through §4.1-345, and §4.1-347;
- Repeals current Title 19.2 ,Ch. 22 of (§19.2-369 - §19.2-386).

HB 718 (Kilgore) - Transfer of juveniles for trial as adults.
Amends § 16.1-269.1

- Expands subsection (C) discretionary transfer of juvenile

- Adds juveniles 14 y/o charged with **repeat** violations of manufacturing, selling, giving, distributing, etc *:*
  - *Controlled substance - § 18.2-248 ; or*
  - *methamphetamine - § 18.2-248.03 ; or*
  - *anabolic steroids - § 18.2-248.5*

- Previously adjudicated, after age 14 y/o.

Brady / Discovery

- *Smith v. Cain,* 132 SCT 627, No. 10-8145 (1/10/2012).
- Smith raised *Brady* claim after obtaining police files containing statements by the eyewitness contradicting his testimony. *Held: Brady* requires that Smith's conviction be reversed.
- Evidence impeaching an eyewitness's testimony may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. *United States* v. *Agurs*, 427 U. S. 97, 112-113, and n. 21. Here, however, the eyewitness's testimony was the *only* evidence linking Smith to the crime, and the eyewitness's undisclosed statements contradicted his testimony. [more →]

Brady / Discovery

- [cont. →]
- Under *Brady,* evidence is material if there is a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone* v. *Bell*, 556 U. S. 449, 469-470. A "reasonable probability" means that the likelihood of a different result is great enough to "undermine[ ] confidence in the outcome of the trial." *Kyles* v. *Whitley*, 514 U. S. 419, 434.

Brady / Discovery

- *Wetzel v. Lambert,* 132 SCT 1195, No. 11-38 (2/21/2012)

- Supreme Court vacates 3rd Circuit grant of habeas relief on the state's failure to disclose a "police activity sheet." Federal court failed to credit reasonable state court determination that the document contained only ambiguous and speculative references.

Excited utterance hearsay exception

- *Thomas Lee Hicks v. Commonwealth,* No 1431114 (05/29/2012)

- Trial court did not err in admitting deceased victim's statements under the excited utterance exception to rule against hearsay where statements were made immediately after victim was shot and appellant had opportunity to cross-examine victim at the preliminary hearing.

HB 101 (Loupassi) / SB 94 (Edwards) **- Virginia Rules of Evidence**

- NEW Virginia Rules of Evidence applicable in any civil or criminal case *pending or commenced* after July 1, 2012.
- On-line via Va Sup. Court "News" webpage:

  www.courts.state.va.us/news/home.html

Virginia Rules of Evidence

- Common law authority still valid:
  - Rule 2:102 of the Rules of Evidence shall contain the following language, as its third sentence: *"Common law case authority, whether decided before or after the effective date of the Rules of Evidence, may be argued to the courts and considered in interpreting and applying the Rules of Evidence.*"

HB 424 (Bulova) – **Self-authentication of school records.** Amends § 8.01-390.1

- Expands rule that school records are admissible to any matter where such records are material and otherwise admissible, if they are authenticated as true and accurate copies by the custodian or the person to whom the custodian reports.
- Currently, such authenticated school records are only admissible in cases involving custody of the student or termination of parental rights.

HB 972 (Rob Bell)

Invol. commitment and recent finding of incompetent to stand trial. Amends § 37.2-817

- Involuntary commitment determination to consider whether person recently has been found by a court to be unrestorably incompetent to stand trial.

HB 391 (Gilbert) –**Juvenile records access by correctional facilities. Amends § 16.1-300**

- Confidentiality under § 16.1-300 (A), for juvenile social, medical, psychiatric / psychological records, limits sharing only to statutorily listed parties

- *Amends to allow access to s*tate and local correctional facilities having custody or supervision of adults who are the subject of such juvenile records.

New Crimes / Punishments

HB 752 (Cline) / SB 459 (Herring) - **Strangulation**
***New* § 18.2-51.6**

- Specific offense of "strangulation."
- Class 6 felony for defendant who,
  - *without consent,*
  - *impedes the blood circulation or respiration of another person*
  - *by knowingly, intentionally and unlawfully*
  - *applying pressure to the neck of such person*
  - *resulting in the wounding or bodily injury of such person*

Sexual battery

- *Gonzin v. Commonwealth* & *Cousins v. Commonwealth*, 59 Va App 1, 716 SE2d 466 (10/25/2011)

- Conviction of aggravated sexual battery reversed and remanded for sentencing on misdemeanor sexual battery conviction where Commonwealth failed to meet its burden of proof that victim suffered a serious mental injury in the attack, an essential element of the felony offense.

HB 753 (Cline) **– CA's motion for juvenile registration.**
Amends § 9.1-902

- Re: Juveniles on Sex Offender and Crimes Against Minors Registry
- Current law: Juveniles (13 y/o +) and adjudicated delinquent **may** be required to register after (1) motion by CA and (2) court's discretionary call.
- No time period for motion.

HB 753 (Cline) – **CA's motion for juvenile registration.**

- *Amended* § 9.1-902 (G) sets outer time limit for motion - *while offender within court's jurisdiction* for the triggering offense.

- Appointment of counsel if necessary.

HB 973 (Rob Bell) / SB 436 (Obenshain) **- Sex Crimes Penalties**
Amends §§ 18.2-61, 18.2-67.1, and 18.2-67.2

- Provides for a **mandatory minimum life sentence** for sexual assault of child under age 13 when alleged in indictment that offender was 18 or older at time of offense.

- For: rape, forcible sodomy, object sexual penetration.

- Current law, 5 years to life; **mandatory minimum 25 years** where the offender is more than 3 years older than child, if done in the commission of abduction, burglary, aggravated malicious wounding.

Sex Crimes Penalties

- Introduced bills **substituted mandatory minimum life sentence** penalty for rape of child by an adult.
- *Final version: "For a violation of clause (iii) of subsection A **where it is alleged in the indictment that the offender was 18 years of age or older at the time of the offense**, the punishment shall include a mandatory minimum term of confinement for life."*
- Retains 3 years older mandatory 25 years and mandatory 40 year suspended sentence (if not a life sentence)

HB 508 (Garrett) / SB 273 (Smith) **- Cannabinoids and bath salts.**
Amends §§ 18.2-248.1:1 and 54.1-3446

- Adds new identified chemical combinations of synthetic cannabinoids and "bath salts."

- Provides a more generic chemical description of synthetic cannabinoids in § 18.2-248.1:1 →

Cannabinoids and bath salts

- *Synthetic Cannabinoid:*

– any substance that contains one or more *cannabimimetic agents*

– *Or contains their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation,*

– and any preparation, mixture, or substance containing, or mixed or infused with, any detectable amount of one or more *cannabimimetic agents…*

Controlled substances

- *Sierra v. Commonwealth*, 59 Va APP 770, 772 SE2d 656 (03/20/2012).

- Trial court did not err in finding appellant guilty of possession of a controlled substance where plain language of Code § 18.2-250 requires defendant to know substance he possesses is a controlled substance but does not require him to know precisely what controlled substance it is.

HB 1161 (Cline) / SB 294 (Lucas) **– Tracking Meth. Precursors.** *New* §§ 18.2-265.6 - 18.2-265.18; **Effective January 1, 2013.**

- Repeals § 18.2-248.8 –pharmacies, retailers required to maintain logs of ephedrine sales
- State Police to establish Commonwealth's participation in multi-state monitoring system.
- Pharmacies and retail distributors to enter ephedrine, etc, sales.
- Retains existing limit of ≤ 3.6 g ephedrine per day / per customer; ≤ 9 g per 30-day period.

HB 848 (Johnson) / SB 148 (Puckett) **– Meth. lab clean-up costs.**
New 15.2-1716.2

- Provides localities with authority to enact ordinance to make convicted defendant pay to clean up his mess.
- Determine liability at sentencing or separate civil action.

- **HB 1140 (Hodges) – Adds Carisoprodol to Schedule IV.**

- Amends § 54.1-3452. Signed by Governor 4/4/2012.

- **HB 1141 (Hodges) – Adds Ezogabine to Schedule V.**

- Amends § 54.1-3454. Signed by Governor 4/4/2012.

- **HB 649 (Habeeb) / SB 481 (Garrett) – Odometer tampering.**

- Amends § 46.2-112. Increases minimum civil penalty from $1,500 to $3,000.

Murder by methadone

Hylton v. Commonwealth, 723 SE2d 628 (04/10/2012)

- No error in trial court's finding that evidence was sufficient to support conviction of second-degree murder where victim's death, caused by ingestion of methadone, was within res gestae of appellant's felonious possession of the drug.

Abduction by bail bondsman

- *Collins v. Commonwealth* , 283 VA 263, 720 SE2d 530 (1/13/2012)
- Upholding conviction of North Carolina bail bondsman, not licensed in Virginia, for attempted abduction and use of a firearm, trying to capture “fugitive.”
- The General Assembly has abolished any common law privilege for out-of-state bondsmen to enter the Commonwealth without authorization in order to capture fugitives.
- In the absence of common law privilege, defendant had no right to use force to detain anyone.

“Willfully and intentionally” making false statement

- *Smith v. Commonwealth ,* 282 VA 449, 718 SE2d 452 (11/04/2011) [Reversing Court of Appeals]

In a prosecution for "willfully and intentionally making a materially false statement" on a firearm purchase form there was no evidence to support a finding beyond a reasonable doubt that the defendant knew that he had been indicted and thus had actual knowledge that his statement to the contrary was false when he signed the required form.

- Commonwealth failed to prove an element of the crime because there must be evidence to support a finding that the defendant knew the truth but nevertheless intended to, and did, utter a falsehood.

Double Jeopardy

- *Tharrington v. Commonwealth*, 58 VA APP 704, 715 SE2d 388 (9/27/2011)

- Trial court did not err in refusing to dismiss the indictments for grand larceny and larceny with intent to sell or distribute on double jeopardy grounds where General Assembly clearly and unambiguously intended that each statutory offense be punished separately.

HB 546 (Comstock) – **GANGS: "Pandering" a predicate act.** § 18.2-46.1

- Gang participation felony is participating in gang and committing "predicate criminal act" for benefit of gang. § 18.2-46.2.
- Bill amends list of predicate criminal acts in § 18.2-46.1 to add **§ 18.2-357** , the taking or detaining of any person into a place for the purpose of prostitution and the receiving of money from earnings of any person engaged in prostitution.

Gang participation

- *Morris v. Commonwealth*, 58 Va APP 744, 716 SE2d 139 (10/18/2011)

- No error in trial court's finding that appellant participated in criminal acts that were committed for the benefit of, at the direction of, or in association with a criminal street gang where appellant, while a member of the Bloods, knew he was interacting with Crips members in unprovoked attacks on others.

HB 963 (Rob Bell) **- Solicitation of child pornography.**
Amends § 18.2-374.1:1

- Recruiting others into trading or sharing child pornography.
- Targets Δ who *(ii) commands, entreats, or otherwise attempts to persuade another person to send, submit, transfer or provide to him any child pornography in order to gain entry into a group, association, or assembly of persons engaged in trading or sharing child pornography.*
- Penalty: 5-20 years; 2nd/subsequent: 5-20 years with 5 years mandatory minimum.

HB 964 (Rob Bell) – **Displaying grooming materials.**
New *§ 18.2-374.4*

- Class 6 felony for person ≥18 y/o to display child pornography or “grooming materials” to child under 13, with intent to encourage child to engage in fondling, sexual activity with another.

- "Grooming video or materials" means cartoon, animation, images, depicting **a child** engaged in in fondling, sexual activity with another.

HB 479 (Albo) / SB 347. (McDougle) **– Contraband cigarettes.** Amends §§ 58.1-1000 , 58.1-1037 , and adds new § 58.1-1017.1.

- Establishes quantity limits and criminal and civil penalties for possession with intent to distribute contraband tax-paid cigarettes outside the legitimate distribution chain.
- *Any person other than an authorized holder who possesses, with intent to distribute, more than 5,000 (25 cartons) tax-paid cigarettes is guilty of a Class 2 misdemeanor for a first offense and is guilty of a Class 1 misdemeanor for any second or subsequent offense. [and civil penalties]*

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HB 39 (Tata) – **Causing phone to ring to annoy, 2nd /subsequent.**

Amends § 18.2-429

- 2nd/subsequent violation of § 18.2-429 is Class 2 misdemeanor if prior conviction occurred before the date of the offense charged.
- Causing another's phone or "digital pager" to ring or to otherwise signal, with or without intent to communicate but **with intent to annoy.**

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HB 87 (Knight) **- Projecting a laser at an aircraft.**
Amends § 5.1-22

- **Class 1 misdemeanor to point laser at aircraft.**
- Any person who interferes with or threatens to interfere with the operation of any aircraft, *unless he is authorized by the Federal Aviation Administration or the armed forces of the United States, ...*

DUI

- *Enriquez v. Commonwealth*, 283 Va 511, 722 SE2d 252 (3/2/2012).
- "We establish the rule that when an intoxicated person is seated behind the steering wheel of a motor vehicle on a public highway and the key is in the ignition switch, he is in actual physical control of the vehicle and, therefore, is guilty of operating the vehicle while under the influence of alcohol within the meaning of Code §18.2-266." See also, *Nelson v. Commonwealth*, 281 Va. 212, 707 S.E.2d 815 (2011).

HB 279 (Iaquinto) / SB 378. (McEachin) **- DUI ignition interlock.**
Amends *§§ 18.2-270.1*

- Currently interlock mandatory for 2nd/subsequent DUI offense and offense where BAC ≥ 0.15; optional otherwise for 1st offense DUI.
- Bills require interlock to drive after **first** offense; interlock on **all vehicles** for DUI maiming and 2nd/subsequent DUI.
- Court "*orders*" [not "directs"] offender not to operate non-interlock vehicles. §18.2-270.1 (C).

HB 279 (Iaquinto) / SB 378. (McEachin) **- DUI ignition interlock.**

- Other interlock requirement details remain same:
  - §18.2-270.1(B)(fee, electronic log, VASAP enrollment, etc)
  - §18.2-270.1 (D) (notifying VASAP, monitoring and calibration, offender pays, etc).
  - §18.2-270.1 (E) (class 1 misdemeanor to tamper, assist in evading interlock requirement)
- Amends *§ 18.2-271.1* to allow prequalification for interlock, but no installation until court issues restricted license.

HB 961 (Rob Bell) **– Civil action for shoplifting, employee theft.**
Amends § 8.01-44.4

- Civil action for shoplifting or employee theft, brought by merchant notwithstanding criminal action for same conduct.

HB 97 (Wilt) – **Motorcycles driving two abreast in a single lane. Amends § 46.2-857**

- Allows two-wheeled motorcycles to drive two abreast in a single lane.

HB927 (Lingamfelter) – **Scrap purchasers of certain metal items.**
Amends § 59.1-136.1

- Definition of "proprietary articles" is amended to add any telecommunications cable that is one-half of one inch or greater in diameter and that contains 50 or more individual strands of solid, insulated, color-coded copper wire.

HB 1020 (Spruill) **- Precious metal dealers' retention time.**
Amends § 54.1-4104.

- Bill amends § 54.1-4104. to extend time period from 10 to ***15*** calendar days that precious metal dealers must not sell, alter, or dispose of a purchased item in whole or in part, or remove it from the county, city, or town in which the purchase was made.

CHILD ABUSE REPORTINGREQUIREMENT

- **HB 3 (Robert Marshall)**
- **HB 970 (Rob Bell)**
- **HB74 Richard Bell**
- **HB 1237 (Scott)**

Amending § 63.2-1509 expanding individuals with duty to report suspected child abuse or neglect to DSS, and specifying procedures.

NB: existing § 63.2-1509 (C) provides civil and criminal immunity for persons making report and providing information.

Law Enforcement Issues.

HB 556 (Albo) – **Publication of public officials' personal information. Amends § 18.2-186.4:1**

- Currently prohibits state or local agency from publicly posting home address, personal telephone numbers of law-enforcement officer; and procedures.
- Bill expands protected class, deletes requirement for a hearing, and includes personal cell numbers and email addresses.
- *"Public official" means any state or federal judge or justice and any law-enforcement officer.*

- **HB 969 (Rob Bell) / SB 301 (Howell) – SART meetings to include campus police.**
- Amends § 15.2-1627.4.
- **HB 771 (Landes) – Campus police are law-enforcement officers.**
- Amends § 9.1-101. Provides that campus police officers, as appointed by public and private institutions of higher education, are included within the definition of law-enforcement officer.
- Governor's technical amendment 4/9/2012 to extend concealed carry provisions to *retired* campus police.
- **HB 965 (Rob Bell) / SB 302 (Howell) - Campus police mutual aid agreements re rape, homicide.**
- Amends § 23-234. Requires campus police to enter into mutual aid agreements with an adjacent local law-enforcement agency or the State Police for cooperation in providing assistance with the *investigation of deaths and alleged rapes occurring on college campuses*.

HB 770 (Landes) – **No emerg. protective orders against LEO's. Amends § 19.2-152.8**

- New language, subsection (K):

"No emergency protective order shall be issued pursuant to this section against a law-enforcement officer for any action arising out of the lawful performance of his duties."

Police liability for damages for constitutional violations.

- *Ryburn v. Huff,* 132 SCT 987, No. 11-208 (1/23/2012).

- Supreme Court reverses 9th Circuit in federal civil rights lawsuit (42 USC § 1983) alleging police officers violated 4th Amendment rights by entering home without a warrant.
- Police were entitled to qualified immunity from damages because reasonable police officers could have come to the conclusion that the Fourth Amendment permitted them to enter the plaintiffs' residence if there was an objectively reasonable basis for fearing that violence was imminent based on the facts as found by the district court.

Police liability

- *Rehberg v. Paulk,* 132 SCT 1497, No. 10-788 (4/2/2012)
- Affirming 11th Circuit's ruling in federal civil rights lawsuit (42 USC § 1983) granting immunity to chief investigator for DA's office who allegedly presented false testimony to grand jury.
- A witness in a grand jury proceeding is entitled to the same absolute immunity from suit as a witness who testifies at trial.

The End

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